

SINGH (Migration) [2019] AATA 3263 (28 March 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Mr Harsimranjit Singh
CASE NUMBER: 1817434
HOME AFFAIRS REFERENCE(S): CLF2013/102515
MEMBER: Kira Raif
DATE: 28 March 2019
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 28 March 2019 at 4:29pm

1. **CATCHWORDS**

2. *MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner) – relationship not genuine – contrived marriages scam – limited evidence – decision under review affirmed*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5F, 65, 359A, 359C, 360(3), 363A, 376

Migration Regulations 1994 (Cth), Schedule 2 cls 820.211(2)(a), 820.221, r 1.15A(3)

CASES

Hasran v MIAC [2010] FCAFC 40

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

Application for review

5. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant is a national of India, born in October 1988. He travelled to Australia holding a Student visa in 2008. In 2011 the applicant made an application for a Skilled visa, which was refused. The applicant then made an application for another visa which was also refused and affirmed by the Tribunal. The applicant sought judicial review in relation to that decision but withdrew his application in May 2013. At about the same time he married the sponsor and made the application that is the subject of this review.
7. The applicant applied for the Partner visa on 9 May 2013 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant sought review of the delegate's decision and on 7 June 2016 the Tribunal, differently constituted, affirmed the decision under review. The court remitted the matter for reconsideration by the Tribunal in June 2018.
8. There is on the Departmental file a Certificate issued under s. 376 of the Act. Although the Tribunal informed the applicant of the existence of the Certificate, the Tribunal has formed the view that it is not valid, as it fails to meaningfully identify the documents that is the subject of the certificate. The Tribunal determined that the information should be released to the applicant and the existence of the allegation was the subject of the Tribunal's letter to the applicant dated 25 February 2019 that was issued pursuant to s. 359A of the Act.
9. On 25 February 2019 the Tribunal wrote to the applicant pursuant to s.359A of the Act, inviting the applicant to provide comments on information that it considered would be part of the reason for affirming the decision under review in writing. The invitation was sent to the last address provided in connection with the review and advised that, if the comments were not provided in writing by 11 March 2019, the Tribunal may make a decision on the review without taking further steps to obtain the comments and the applicant would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.
10. The applicant has not provided the comments within the prescribed period and no extension has been granted. In these circumstances, s.359C applies and pursuant to s.360(3) the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40. The Tribunal has decided to proceed to decision without taking further steps to obtain the comments.

Relevant law

11. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the

present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.

13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3). Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided with his application a copy of his marriage certificate showing the parties had registered marriage in May 2013. There is nothing to suggest the marriage is not a valid one. The Tribunal accepts that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

15. The Tribunal has some concerns about the applicant's immigration history. As noted above, the applicant entered Australia on a Student visa, made an application for a Skilled visa which was refused and then an application for another visa which was also refused. It appears to have been at the time when the applicant exhausted other options of remaining in Australia that he married the sponsor and made the application for the Spouse visa. The Tribunal accepts that a genuine relationship is not inconsistent with a desire to remain in Australia and the applicant's apparent intention to establish residence in Australia is not indicative of the relationship not being a genuine one. However, the applicant's immigration history, together with other concerns set out below, does bring into question the existence of the parties' commitment to this relationship.
16. The Tribunal's concerns are exacerbated by two further matters. First, the Department received an allegation that the relationship is not a genuine one and that cash payment has been made between applicant and the sponsor. This information was put to the applicant pursuant to s. 359A of the Act but the applicant had not provided any comments or response. The Tribunal gives this allegation some weight. Secondly, this case has been identified as being affected by a known residency scam where marriages are arranged of the benefit of obtaining permanent residence. Again, the applicant failed to provide his comments or response to that information. The totality of such concerns causes the Tribunal to find that the relationship is not, and has never been, a genuine one.
17. The Tribunal acknowledges that documentary evidence has been presented with the application and to the Tribunal, which seeks to address the various aspects of the relationship. However, such evidence does not satisfy the Tribunal that the relationship is that of spouses or is a genuine one. Such evidence does not overcome the Tribunal's concerns noted elsewhere. The Tribunal is of the view that if the relationship were not a genuine one, it would still be possible to prepare, or obtain, a substantial amount of evidence of the kind that has been presented with application, such as the phone bills, letters and emails, photographs and evidence of joint activities, overseas travel and statements from

third parties. In the Tribunal's view, such evidence may be available whether or not the parties are in a genuine relationship and whether or not both have commitment to such a relationship. More is needed to satisfy the Tribunal that the relationship is genuine and that there is a genuine commitment to the relationship. The parties have not done that.

18. There are a number of statements from third parties and the Tribunal accepts that those who provided statements believed at the time the statements were written that the relationship between the applicant and the sponsor was a genuine one. (The delegate formed the view that many of the statements were not prepared by the writers as they appear to have similar grammatical and syntax errors.) There is also limited photographic evidence of the couple's social activities. The Tribunal accepts that the applicant and the sponsor had undertaken social activities, depicted in the photographs, together. The Tribunal also acknowledges the medial report from Dr Mitchell of 17 May 2016. Dr Mitchell refers to the applicant and the sponsor meeting at a Christmas party in 2010 and their marriage in 2013. It is unclear how Dr Mitchell would be aware of that information, unless it was presented to her by the parties. Dr Mitchell refers to the applicant being supportive of the sponsor during the treatment and refers to them having a stable relationship. While the Tribunal acknowledges that evidence, the Tribunal does not consider that it is up to the medical practitioner to make that determination. Nevertheless, insofar as that statement evidences the social recognition of the relationship, the Tribunal accepts that evidence.
19. The previous Tribunal raised with the applicant its concerns that the applicant had made several overseas trips without the sponsor. In his declaration of 2 July 2013 the applicant states that the sponsor gave him several reasons for not going to India. The applicant states that the sponsor did not speak the language and would feel isolated, she was also concerned about the Safety of women in India and that there would be no facilities or western food in his village. The Tribunal finds these reasons unpersuasive. In relation to the language limitations, the applicant could easily act as an interpreter between the sponsor and his family, friends and neighbours. In relation to concerns for women, the Tribunal is mindful that the sponsor would be travelling to the specific place, the applicant's home village and his family home and would be accompanied by the applicant and supported by his family. General concerns about women's welfare in India may not be helpful. As for lack of western food and facilities, any visit that the applicant and the sponsor could make, would have been a relatively brief one and the Tribunal is not satisfied that the sponsor would not have been able to manage without such facilities or that her desire for such facilities justifies not meeting close family members. The applicant also states that he could not leave his wife alone for many months and that his wife was dependent on his support, so he cannot leave Australia. This may explain why the applicant was unwilling to make the visa application offshore but does not explain short visits outside Australia. The Tribunal considers the fact that the applicant had made several trips to India without the sponsor is indicative of the fact that there is lack of interest by the sponsor to meet the applicant's close family and lack of desire by the applicant to introduce the sponsor to his family. This is despite the fact that the applicant has a close relationship with his family and has visited them on multiple occasions. The Tribunal is of the view that this is strongly indicative that the parties do not view the relationship as a long term one and lack mutual commitment.
20. Further, in his submission to the Tribunal of 30 May 2016 the applicant notes that his wife travelled to Thailand on her own to visit friends. He notes that the sponsor did not tell him about his travel but he understands her and notes that she had to see friends and deal with her depression. However, providing care and support to each other may be indicative of a mutual commitment. That is, it may have been the applicant providing assistance to his wife during her illness. While the Tribunal acknowledges the applicant's evidence that they travelled together in Australia, the Tribunal notes that at the time of the first Tribunal decision, the couple made several trips overseas but not together. The Tribunal considers that problematic and indicative of lack of mutual commitment to the relationship.

21. The parties claim to have formed a committed relationship in 2013. If true, the Tribunal acknowledges that the relationship may be viewed as a long term one as it has been in existence for nearly six years. However, for the reasons stated elsewhere, the Tribunal is not satisfied that the relationship is, or had ever been, a genuine one. The Tribunal's concerns are not overcome by the length of this claimed relationship.
22. As evidence joint finances, the applicant provided with his application evidence of a joint bank account. The Tribunal notes that the only income in the account appears to be transfers from another account. There is no evidence that the joint account was used for salary deposits, pensions or other regular income. The applicant's evidence to the first Tribunal is that both he and the sponsor use individual accounts for their salaries. The Tribunal accepts that the joint account was used for various purchases but since the couple use other accounts for their income, the Tribunal is concerned that the joint account was only opened for the purpose of establishing evidence to support the visa application.
23. The applicant's evidence to the first Tribunal is that he and his partner had no joint assets and no shared financial obligations. The applicant's evidence was that he purchased a car for his wife and she is the beneficiary of his superannuation policy. The Tribunal accepts that evidence but is of the view that such arrangements could have been made for the benefit of the visa application.
24. There is other evidence concerning the couple's finance, including bills in joint names. The Tribunal is mindful that those who sent such correspondence to the applicant and the sponsor would not have undertaken any checks about their cohabitation or living arrangements. Their common address was recorded purely on advice of the applicant or sponsor. Neither was any checking done as to how the financial obligations were met by the couple. The fact that joint names appear on the electricity bill, for example, does not mean that the couple pooled their resources to pay the bill. Similarly, the applicant and the sponsor provided evidence that their address was recorded on their driver licenses and other correspondence. Again, the Tribunal notes that no checking would have been done as to whether they did in fact live at that address, or whether they lived as a couple, as flat mates or had some other arrangements. The Tribunal does not consider that such evidence necessarily establishes a joint household or joint financial arrangements.
25. The applicant provided to the previous Tribunal a copy of the residential tenancy agreement. The document is dated February 2015. As the couple claim to have been in a relationship since 2013, it is unclear why they only arranged a joint lease agreement in 2015. There is little other evidence of the couple's cohabitation and sharing of housework.
26. The Tribunal also notes that much of the presented evidence does not relate to the couple's present circumstances. That is, there is little evidence that at the time of this decision, the applicant and the sponsor continue to be in a spousal relationship and the Tribunal has not had the opportunity to question the parties to obtain, and test their evidence.
27. On the evidence before it, the Tribunal is not satisfied that at the time of this decision, the applicant and the sponsor continue to have any joint ownership of assets, joint liabilities or that they pool their financial resources. The Tribunal is not satisfied they owe legal obligations to each other. The Tribunal is not satisfied they presently share day to day household expenses.
28. The Tribunal is not satisfied on the limited current evidence that at present, the applicant and the sponsor live together and that they share housework. There is no evidence that they have joint responsibility for the care and support of children.

29. As noted above, there are a number of social photographs of the couple and statements from third parties. The Tribunal accepts that at the time these documents were prepared or submitted, the parties socialised together and represented themselves to others as being in a relationship. There is no evidence that they continue to do so at present. There is no evidence that at present, the applicant and the sponsor represent themselves to others as being married. The Tribunal is not satisfied friends and acquaintances believe the relationship to be a genuine one. The Tribunal is not satisfied the applicant and the sponsor continue to plan and undertake joint social activities.
30. The Tribunal finds the evidence concerning nature of the parties' commitment to each other to be problematic. As noted above, the applicant and the sponsor have not undertaken joint overseas travel and had taken minimal steps to spend time with each other's families. This is despite the significant length of the relationship. The allegation received by the Department indicates that the relationship is not a genuine one and the applicant's case has been identified as being affected by a contrived marriages scam. There are several significant concerns about this relationship, noted above, which have not been explained to the satisfaction of the Tribunal.
31. Despite the length of the relationship and the length of time lived together, The Tribunal is not satisfied on the evidence before it that the applicant and the sponsor provide each other with companionship and emotional support or that they draw such support from each other. The Tribunal is not satisfied that they view the relationship as a long term one.
32. The Tribunal has had regard to the totality of the circumstances in this relationship. The various concerns set out above, coupled with very limited evidence concerning the various aspects of the relationship at present, cause the Tribunal to find that there is no spousal relationship.
33. The Tribunal is not satisfied that the applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is not satisfied they have a genuine and continuing relationship. The Tribunal is not satisfied they live together or not separately and apart on a permanent basis. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision. Therefore the applicant does not meet cl.820.211(2)(a) and cl.820.221.
34. There is no evidence that the applicant meets any of the exceptions set out in cl. 820.211 or cl. 820.221.

Conclusion

35. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

36. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Kira Raif
Senior Member